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No. 88-676

In the Supreme Court of the United States

OCTOBER TERM, 1988

JERRY W. IKARD, D/B/A IKARD MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

This is an action against the United States under the Federal Tort Claims Act. The questions presented are:

1. Whether the United States, if a private person, would be liable under Alabama law for wrongfully refusing to do business with petitioner.

2. Whether, in any event, petitioner's claims that federal employees made negligent misrepresentations to a debarring official and discriminated against him in awarding contracts are precluded by 28 U.S.C. 2680(h), which prevents recovery for "[a]ny claim arising out of * * * misrepresentation" and "interference with contract rights," or the discretionary function exception, 28 U.S.C. 2680(a).

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1-A2) is reported at 853 F.2d 931 (Table). The order of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1988. The petition for a writ of certiorari was filed on September 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Jerry Ikard is the sole owner of Ikard Manufacturing Company, whose primary customer is the Army Missile Command (MICOM) at Redstone Arsenal,

Alabama. Petitioner's complaint alleged that in late 1981 MICOM put Ikard on a list of "problem" contractors to be avoided if at all possible. His complaint then alleged that in 1984 the company was suspended and debarred, after an administrative hearing, for a period of 19 months because it had been delinquent in performing many contracts. Petitioner asserted that in compiling the information upon which MICOM based its recommendation that Ikard be debarred, MICOM employees, including attorneys, negligently withheld evidence showing that there were other contractors with similar or worse delinquency records that had not been sanctioned. Petitioner claimed that the debarring official also was misled when, after Ikard requested reconsideration of the duration of its debarment, MICOM employees provided information to the official erroneously listing several contracts that had been awarded to Ikard as terminated for default or scheduled for default. The complaint also asserted that the 19-month suspension was excessive compared with suspensions of certain large firms found to have defrauded the United States. Pet. App. A25-A31.

Petitioner's complaint also alleged that Ikard's security clearances were improperly cancelled in 1985 after MICOM employees falsely reported that all of the firm's contracts with MICOM had been either completed or terminated for default. This cancellation allegedly caused Ikard to be denied a contract from a prime contractor with whom negotiations were in progress. Petitioner further alleged that there was a four-month delay in restoring Ikard's security clearance while it was bidding on classified solicitations, whereas contractors with no prior security clearance received them "in a matter of days." Pet. App. A32-A34.

Petitioner's complaint further alleged that in 1987 Ikard was improperly denied the opportunity to bid on a con-

tract for the repair and rebuilding of TOW-2 Missile System Cable Assemblies. Petitioner claimed that after the Small Business Administration recommended that Ikard be considered for the contract, a MICOM contract specialist replied that Ikard would not be solicited because it was on MICOM's Contractors Requiring Special Attention list and the Defense Contract Administration Service alert list, although those lists were not to be used as "black lists." Pet. App. A34-A36.

Petitioner alleged that MICOM's withholding of relevant information in Ikard's debarment proceeding and MICOM's alleged black-listing of Ikard with respect to the TOW-2 contract violated his Fifth Amendment due process right and the analogous clause of the Alabama constitution, as well as the federal acquisition regulations. With respect to the alleged inequality of treatment between Ikard and other firms, the complaint claimed that this was a denial of equal protection under the federal and Alabama constitutions and violated the federal acquisition regulations. To the extent that attorneys were involved in any of the alleged wrongful conduct, petitioner claimed that their actions violated an Alabama statute regulating attorneys. Petitioner claimed that all of the alleged constitutional, statutory, and regulatory violations constituted negligence per se, and sought relief under the Federal Tort Claims Act (FTCA). Pet. App. A38-A44.

2. The district court dismissed petitioner's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Pet. App. A3-A6. In so doing, the district court adopted as its opinion (*id.* at A5) the government's memorandum of law (*id.* at A7-A23) filed in support of its motion to dismiss.

The government's memorandum explained that for petitioner to have a claim under the FTCA, he must allege a tort cognizable under Alabama law (Pet. App. A8-A10).

As in *Art Metal-U.S.A., Inc.* v. *United States,* 753 F.2d 1151. 1159-1160 (D.C. Cir. 1985), an analogous case involving District of Columbia tort law, Alabama tort law imposes no duty to use due care in awarding contracts (Pet. App. A11-A14). In addition, the memorandum noted that under Alabama law negligence per se applies only in traffic violation cases and thus is inapplicable here (*id.* at A17). Insofar as the complaint alleged denials of equal protection and due process, the memorandum, relying on *McCollum* v. *Bolger,* 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987), noted that the FTCA provides no remedy for such constitutional violations (Pet. App. A17-A18).

In addition, the memorandum pointed out that 28 U.S.C. 2680(h) specifically precludes recovery based on misrepresentation and interference with contract rights, and that petitioner's claims all involve allegations that government officials made misrepresentations or that Ikard improperly was denied contracts (Pet. App. A18-A20). Finally, the memorandum noted (*id.* at A20) that decisions regarding the awarding of government contracts involve the exercise of discretion, and argued that claims based on such decisions are expressly barred by 28 U.S.C. 2680(a).

The court of appeals, in a per curiam order, affirmed the district court's dismissal of petitioner's complaint. Pet. App. A1-A2.

ARGUMENT

Petitioner provides no good reason why this Court should consider this case, which primarily involves issues of Alabama law. There is no conflict among the circuits with respect to the questions presented, nor is the dismissal of petitioner's complaint inconsistent with any decision of this Court.

1. As the courts below recognized, the primary defect in petitioner's claim is that there is no authority suggesting that, under Alabama law, a private company that refused to do business with a prospective bidder, even if the refusal was the result of negligence or malpractice, would be subject to a tort action.[1] Since 28 U.S.C. 1346(b) provides that the United States is liable under circumstances where "a private person * * * would be liable to the claimant in accordance with the law of the place where the act or omission occurred," that defect is fatal. Whether the courts below, which are presumably expert in Alabama law, erred in their analysis of that law is not a matter warranting this Court's review. See *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976); *MacGregor* v. *State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942).

In any event, there is no merit to petitioner's contentions that the United States, if a private party, would be liable under Alabama law. Petitioner has cited no case, other than traffic cases, involving the application of negligence per se in Alabama. Nor has he provided any authority showing that Alabama courts would allow a plaintiff under analogous circumstances to bring a tort action against a private person alleging a violation of constitutional or statutory rights. In short, petitioner's theories as to comparable Alabama causes of action are so tenuous as not to merit serious consideration, and this is exactly why they were treated summarily by the two courts below.[2]

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[1] Courts have not been receptive to similar claims under other state laws. See *Cecile Indus., Inc.* v. *United States*, 793 F.2d 97 (3d Cir. 1986) (no analogous Pennsylvania tort); *Art Metal-U.S.A.* (no analogous D.C. tort).

[2] Petitioner's reliance (Pet. 27-29) on *Hatahley* v. *United States*, 351 U.S. 173 (1956), is misplaced. There was no contention there that the government's willful destruction of the plaintiff's horses would not constitute a tort under state law. Rather, the issue was whether the

2. Even if petitioner had a cause of action under Alabama law, his claims would nevertheless be barred by 28 U.S.C. 2680(h). That exception to the FTCA provides that the federal government is not subject to suit in "[a]ny claim arising out of * * * misrepresentation" or "interference with contract rights." Petitioner's suit plainly arises out of such torts, as he alleges that government employees misrepresented various facts to the debarring official in connection with Ikard's 1984 debarment and misrepresented other facts that caused the suspension of Ikard's security clearances in 1985, and all of Ikard's alleged injuries are to prospective contract rights. Accordingly, unlike *Block* v. *Neal,* 460 U.S. 289, 297 (1983), on which petitioner relies (Pet. 56-59), petitioner's misrepresentation and interference with contract rights claims are essential to his negligence claim. See *Art Metal-U.S.A.*, 753 F.2d at 1153-1156. Finally, decisions with respect to the selection and debarment of contractors are matters on which the government exercises discretion, and, as the courts below agreed, at least some of petitioner's contentions are barred by the discretionary function exception. In the absence of a conflict in the circuits, these matters do not warrant review by this Court.

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government's action was nevertheless permitted by federal law (*id.* at 180).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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